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10  
11 **UNITED STATES DISTRICT COURT**  
12 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**  
13

14 MICHAEL LAVIGNE, *et al.*,  
15 Plaintiffs,  
16 vs.  
17 HERBALIFE LTD., *et al.*,  
18 Defendants.

CASE NO. 2:18-cv-07480-JAK (MRWx)  
[Related Case 2:13-cv-02488-BRO-RZ]

**HERBALIFE'S NOTICE OF  
MOTION AND MOTION TO  
EXCLUDE TESTIMONY OF  
PLAINTIFFS' EXPERT  
DR. WILLIAM W. KEEP**

*[Filed concurrently with Declaration of  
Gopi K. Panchapakesan; and [Proposed]  
Order]*

Date: June 7, 2021  
Time: 8:30 A.M.  
Crtrm.: 10B

Assigned to Hon. John A. Kronstadt

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on June 7, 2021, at 8:30 A.M. in  
 3 Courtroom 10B in the United States Courthouse located at 350 W. 1<sup>st</sup> Street,  
 4 Los Angeles, California 90012, the Honorable John A. Kronstadt presiding,  
 5 Defendant Herbalife International of America, Inc. (“Herbalife”) will move,  
 6 pursuant to Federal Rules of Evidence 401, 402, 403, 702, and 703, for an order  
 7 precluding Plaintiffs’ expert Dr. William W. Keep from offering opinions and  
 8 testimony in this case on grounds that Dr. Keep’s purported expertise does not  
 9 qualify him to opine on whether Herbalife’s conduct and representations were  
 10 fraudulent; his opinions are not based on any scientific data and analysis and  
 11 therefore are not helpful to the jury; and his opinions regarding Herbalife’s goal of  
 12 retaining distributors are not relevant to any material issues in this case. This  
 13 motion is based on this Notice, Defendant’s Memorandum in Support, the  
 14 Declaration of Gopi K. Panchapakesan, and accompanying Exhibits, such matters of  
 15 which this Court may take judicial notice, and other matters and arguments as may  
 16 be presented to this Court in connection with this Motion.

17 This Motion is made following a conference of counsel pursuant to Local  
 18 Rule 7-3 which took place on February 8, 2021, wherein the parties were unable to  
 19 agree on a resolution of the matters raised in this Motion, and Counsel for Plaintiffs  
 20 indicated Plaintiffs’ intent to file an opposition to this motion.

21  
 22 DATED: February 15, 2021 Bird, Marella, Boxer, Wolpert, Nessim,  
 23 Drooks, Lincenberg & Rhow, P.C.

24  
 25 By: /s/ Mark T. Drooks  
 26 Mark T. Drooks  
 27 Attorneys for Defendant Herbalife  
 28 International of America, Inc.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiffs have proffered Dr. William W. Keep, a professor of marketing, as an expert on the economic structure and ethical appropriateness of multi-level marketing (“MLM”) companies. Although Keep’s expert report presumes otherwise, his purported marketing expertise *does not* make him an expert in whether or not Defendant Herbalife International of America, Inc. (“Herbalife”) committed fraud—no expert would be qualified to make such a determination. Nor does it give him license to offer opinions that are entirely irrelevant to, and incapable of helping the jury resolve, any disputed material issues in this case.

*First*, Keep’s purported expertise does not qualify him to render his overarching opinions that essentially restate the allegations in Plaintiffs’ First Amended Complaint (“FAC”)—namely, that it was fraudulent or inappropriate for Herbalife to tout its events as helpful to distributors’ success, because (according to Keep) Herbalife’s business model carries a “low” likelihood of success. Keep also claims Herbalife made certain misrepresentations that Plaintiffs themselves have never asserted are actual misrepresentations, namely that (1) Herbalife represents that STS events are “completely independent and under local control” when in fact Herbalife “works closely” with organizers of the STS events; and (2) Herbalife fails to disclose the fact that its “true purpose” for holding events is retention of distributors. Again, Keep is an expert in marketing—not assessing fraud or control or “true” intent.

*Second*, any expertise of Keep’s that he claims *is relevant* to these opinions was not employed in reaching them. Keep’s report is devoid of any scientific analysis; evidence of Herbalife distributors’ actual likelihood of success or evidence supporting his conclusion that it is “low” compared to other MLMs or businesses generally; data or expert analysis of who did or should control STS events; or data sufficient to ascertain the “real purpose” of Herbalife events. He merely

1 regurgitates deposition testimony and allegations from the FAC, such as  
2 testimonials delivered from the stage at an event, and concludes that Herbalife's  
3 event practices are misleading. Given this absence of any reliable data or analysis,  
4 Keep's opinions lack foundation and amount to no more than a parroting of  
5 Plaintiffs' central allegation that Herbalife employed a fraudulent and inappropriate  
6 business model. The jury is capable reaching or rejecting this conclusion without  
7 Keep's help; indeed, that function is exclusively within the province of the jury.

8 *Third*, Keep's opinion that Herbalife's goal was retention of distributors is  
9 entirely irrelevant. Keep admits there is nothing wrong or unlawful about  
10 a company pursuing retention. While he contends that it was a violation of industry  
11 ethics code and standards for Herbalife not to disclose its retention goals, industry  
12 codes and standards have *nothing to do* with Plaintiffs' RICO, unfair competition  
13 and negligent representation claims in this case; none of Plaintiffs' claims turn on  
14 whether these codes or standards were violated. This case is about whether  
15 Herbalife conspired with top distributors to make false statements or fraudulent  
16 omissions at and about events; it is not about the company's compliance with direct-  
17 selling industry standards or alleged industry ethics violations. Keep's opinions are  
18 intended solely to tarnish Herbalife and prejudice the jury.

19 Because Keep's proposed opinions consist of matters that are outside of his  
20 expertise, lacking in foundation and unhelpful to the jury, and irrelevant to any  
21 material issue in dispute, Plaintiffs cannot satisfy their burden to establish that Keep  
22 is qualified to offer expert opinions in this case. Keep should be precluded from  
23 testifying or offering expert opinions or evidence pursuant to *Daubert v. Merrell*  
24 *Dow Pharms, Inc.*, 509 U.S. 579 (1993), and Federal Rules of Evidence 401, 402,  
25 403, 702, and 704.

## 26 **II. RELEVANT FACTS**

27 Plaintiffs have designated Keep, a marketing professor and self-described  
28 "vocal critic of MLM," to offer opinions regarding Herbalife's use of Success



1 Training Seminars (“STS”) and corporate events. (Expert Report of Dr. William W.  
 2 Keep (“Keep Rpt.”) ¶ 3, Ex. B, attached, to the Declaration of Gopi K.  
 3 Panchapakesan (“Panchapakesan Decl.”) as Ex. A; February 3, 2021 Transcript of  
 4 Deposition of William W. Keep ( “Keep Tr.”) at 136:13-19, Panchapakesan Decl.,  
 5 Exh. B.) Keep’s academic work has included the study of MLMs. He admitted in  
 6 deposition that in all but one of the several cases in which he has testified as an  
 7 expert, he opined that the MLM at issue was a pyramid scheme.<sup>1</sup> According to  
 8 Keep, his training and experience “provide a relevant perspective in understanding  
 9 multilevel marketing practices” that render him qualified to offer the opinions in his  
 10 expert report. (Keep Rpt. ¶ 4, Panchapakesan Decl., Exh. A; Keep Tr. at 8:25-9:10,  
 11 Panchapakesan Decl., Exh. B).

12 **A. Keep’s Proposed Expert Opinions Conclude, in Essence, That**  
 13 **Herbalife Acted Wrongfully or Fraudulently.**

14 Keep intends to offer the following opinions in this case:

- 15 I. “Retention, not distributor success, is the real and unspoken goal of the  
 16 Circle of Success and regular attendance at STS and corporate events”;  
 17 II. “At a cost to downline distributors, Herbalife worked to greatly expand  
 18 STS events that are misrepresented as completely independent and  
 19 under local control”;  
 20 III. “As part of the Circle of Success, over many years Herbalife and top  
 21 distributors communicated to downline distributors the necessity of  
 22 regular attendance at STS and corporate events in order to achieve  
 23 success”;  
 24 IV. “Repetitive storytelling of atypical experiences inspire, ignore, and  
 25 obscure the typical distributor experience, thereby providing,  
 26

27 <sup>1</sup> The lone exception was a case in which that issue was not the subject of his  
 28 testimony. (Keep Tr. at 138:18-139:12, Panchapakesan Decl., Exh. B.)

1 disclaimers notwithstanding, a net impression that the path to success  
2 relies upon following the Circle of Success and monthly attendance at  
3 STS and corporate events”;

4 V. “Disinformation shared at STS and corporate events obscures and  
5 misrepresents the actual typical distributor compensation and  
6 experiences”; and

7 VI. “Herbalife adopted a hear-no-evil, see-no-evil, speak-no-evil approach  
8 to information shared with downline distributors and potential  
9 distributors, failing to share available data relevant to the decision to  
10 become or remain an Herbalife distributor and to follow the Circle of  
11 Success regime.”

12 (Keep Rpt. ¶ 6, Panchapakesan Decl., Exh. A.)

13 Keep’s opinions boil down to his belief that it was fraudulent or otherwise  
14 wrong for Herbalife to promote Herbalife events while also:

- 15 1) Representing that STS and corporate events were important to  
16 distributors’ success when, in fact, Herbalife’s business model provides  
17 a “low” likelihood of success;
- 18 2) Failing to disclose that the “real goal” of STS and corporate events was  
19 distributor retention; and
- 20 3) Representing that STS events were completely independent and under  
21 local control, when in fact Herbalife “maintains controlling influence  
22 over” those events.

23 (*Id.* at ¶ 21; *see also*, Keep Tr. at 11:16-19 (affirming that it is Keep’s opinion that it  
24 is “wrong to make misrepresentations to induce people to attend events.”),  
25 Panchapakesan Decl., Exh. B). The latter two contentions are not even alleged in  
26 the FAC as misrepresentations upon which Plaintiffs base their claims.

**B. Keep's Expert Opinions Are Drawn from His Review of Deposition Testimony and Exhibits, Not from Any Specialized Research or Analysis.**

Keep is clear in his report that his opinions are *not* the product of any specialized research or studies that he conducted in this case. (Keep Rpt. ¶ 4, Panchapakesan Decl., Exh. A.) Rather, apart from some irrelevant studies that purportedly showed a correlation between event attendance and distributor retention, they are based entirely on his analysis of deposition testimony, exhibits, and other papers from this case, as well as industry codes of conduct and ethics. (*Id.*) Keep's deposition testimony confirmed as much.

While Keep opines that Herbalife's representations regarding event attendance were wrongful or fraudulent in light of distributors' alleged "low" likelihood of success (*id.* at ¶ 14), he acknowledged in deposition that he has no frame of reference to assess what constitutes an acceptable success rate. (Keep Tr. at 135:11-20, Panchapakesan Decl., Exh. B.) Nor did he compare Herbalife's success rates—which he purports to have gleaned from Herbalife's publicly available materials—to those of other businesses or MLMs to provide some point of reference for what makes Herbalife's success rates "low" (*id.* at 134:13-135:20):

Q: Say that again there's no legal requirement that MLMs publish information about the success rate of their distributors?

A: I believe that's correct.

Q: Now among those that you studied Nanocare, Genesis NuSkin perhaps some others, did you conclude that any of them had what you considered to be a -- an acceptable level of success among distributors?

A: Yeah I described earnings at how they're being shared (and how). I -- let other people decide whether or not it's acceptable."

(*Id.* at 135:7-20) (objection omitted). Despite this inability to quantify an acceptable success rate, and failure to discuss the success rates of any businesses or MLMs as a means of comparison in preparing his opinions in this case, Keep has had no problem taking a stance that is "highly critical" of the distributor success rate of

1 Herbalife and *every other MLM he has ever studied*. (*Id.* at 135:22-136:6.)

2 Keep similarly reached his opinions regarding Herbalife's obligation to  
3 disclose the extent of its control over STS events based not on expert research or  
4 analysis but, rather, on the inferences and conclusions he drew from the same  
5 testimony, email correspondence, event fliers, and other evidence that will be  
6 available to the jury. (Keep Tr. at 70-71, Panchapakesan Decl., Exh. B. (testifying  
7 that the documents Keep is relying on to reach his opinions on control over events  
8 are the transcripts, exhibits and ethics trade association ethics and conduct codes  
9 listed in his report).) Yet, Keep concedes that he is not in any better position than  
10 the jury to assess whether or not events in question were locally controlled. (*Id.* at  
11 65:25-66:3.)

12 Though he opines that it was fraudulent or wrong of Herbalife not to disclose  
13 its alleged involvement in STS events, Keep admits that he has no basis, other than  
14 reading deposition transcripts in this case, to contend that any distributors  
15 represented to other distributors that STS events were completely independent. (*Id.*  
16 at 61:7-62:9, 63:21-64:13.)

17 Q: So it is your opinion that certain Herbalife distributors made  
18 representations to other Herbalife distributors that the events were  
locally controlled –

19 A: Yes.

20 Q: -- in order to induce those people to attend the event?

21 A: Yes.

22 Q: . . . How frequently did that happen?

23 A: I don't - - No. I don't have enough data.

24 Q: And the only way you know that is by reading the deposition  
25 transcripts; is that right?

26 A: Correct.

27 (*Id.* at 63:21-64:13.) He also has no idea what percentage of distributors believe that  
28 STS events are solely under local control, or would not go to events if they believed

1 the events *were not* under local control, and he has undertaken no study or analysis  
2 to obtain that information. (*Id.* at 90:1-92:11.)

3 Q: If [sic] fact if the -- if all of the events were known to be under  
4 Herbalife control, do you think nobody would attend them?

5 A: I don't -- I -- that is not what I think.

6 Q: So I mean in the -- in the hypothetical world in which Herbalife had a  
7 big sign out and made clear everywhere Herbalife controls these STS  
8 events these are corporate events you don't think the events would be  
9 empty do you.

10 A: I do not think they'd be empty

11 Q: Do you think people would pay less to go to them?

12 A: I don't know what people would pay.

13 Q: So other than some generalized sense that Herbalife distributors prefer  
14 to go to events that they think are locally controlled you really have no  
15 other information as to the extent to which the belief that they were  
16 under local control influenced the conduct of any Herbalife distributors  
17 is that --

18 A: I don't have that data, that's correct.

19 (*Id.* at 91:7-92:11.) Keep also acknowledges that the STS and corporate events have  
20 value to some attendees, though he has not undertaken any analysis to quantify that  
21 proportion. (*Id.* at 41:3-10, 161:4-7.)

22 **C. Keep Admits There Is Nothing Wrongful or Unlawful About a**  
23 **Business Having Retention as a Goal.**

24 Keep's overarching opinion is that "retention is the unspoken goal [of events]  
25 and despite whatever small benefit the distributor may get from attending an event  
26 they are unaware of the real goal which is to retain them to keep trying in an  
27 environment where a large percentage will achieve no financial success. That's in  
28 my view not just unethical but potentially illegal." (*Id.* at 52:22-53:4, 127:24-  
128:4.) Keep nevertheless concedes that there is nothing inherently wrong with  
having retention as a goal, and that retention is not necessarily inconsistent with  
distributor success. (*Id.* at 32:24-33:1.) Keep admitted that:

- "Making distributors more successful is not inconsistent with

1 retention.” (*Id.* at 35-37.)

- 2 • It is “verifiable” that “[d]istributor success would tend to improve  
3 retention.” (*Id.* at 35:9-12, 37:20-23.)
- 4 • “[S]ome ways to improve the likelihood of success would be to educate  
5 distributors concerning new product.” (*Id.* at 36:9-13.)
- 6 • “Some ways to improve the likelihood of success would be to assist  
7 distributors in building [a] down line.” (*Id.* at 36:14-17.)
- 8 • “It would be important to distributor success to educate them  
9 concerning ethical issues.” (*Id.* at 36:18-23.)
- 10 • Despite believing “events provide some value to distributors,” Keep  
11 does not “believe many distributors are capable of assessing whether  
12 benefits they receive at events justify the cost.” (*Id.* at 50:15-22.)

13 Nevertheless, Keep believes that “retention is [] an ethically inappropriate  
14 goal of an MLM” because of what he characterizes—without any quantifiable  
15 standard for the characterization—as a “very high failure rate” of MLM distributors.  
16 (*Id.* at 32:21-33:14.) While conceding that retention is not wrongful *per se*, Keep  
17 still concludes that, because retention is Herbalife’s primary goal, *any* objective of  
18 *any* Herbalife event must run afoul of ethical norms (*id.* at 37:7-16):

19 Q: Okay. Are there any goals for Herbalife events that in your mind do  
20 not violate ethical norms?

21 A: Given my position that a goal – overriding goal is the overriding  
22 unspoken goal is retention then my answer’s no.

23 (*Id.* at 37:11-16). It is this purported violation of ethical norms by Herbalife that  
24 informs Keep’s conclusion that Herbalife’s conduct was “not just unethical but  
25 potentially illegal”—*i.e.*, that Herbalife engaged in actionable misconduct or fraud.  
(*Id.* at 52:21-53:4.)

### 26 **III. LEGAL STANDARD**

27 The U.S. Supreme Court has charged district courts with a “gatekeeping”  
28 function with respect to admitting expert testimony. *Daubert v. Merrell Dow*

1 *Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). The admissibility of all expert  
2 testimony under Rule 702 is a preliminary question of law for the district court to  
3 determine pursuant to Rule 104. *Daubert*, 509 U.S. at 592; Fed. R. Evid. 104(a).<sup>2</sup>  
4 Federal Rule of Evidence 702, which governs the admission of expert testimony,  
5 provides that:

6 A witness who is qualified as an expert by knowledge,  
7 skill, experience, training, or education may testify in the  
8 form of an opinion or otherwise if:

8 (a) the expert's scientific, technical, or other specialized  
9 knowledge will help the trier of fact to understand the  
10 evidence or to determine a fact in issue;

10 (b) the testimony is based on sufficient facts or data;

11 (c) the testimony is the product of reliable principles and  
12 methods; and

12 (d) the expert has reliably applied the principles and  
13 methods to the facts of the case.

14 Fed. R. Evid. 702. The proponent of the expert testimony bears the burden of  
15 establishing that the proffered testimony is admissible under Rule 702. *See*  
16 *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987).

17 The district court, exercising its gatekeeping function, must determine  
18 whether the expert is qualified to provide the proffered testimony, whether the  
19 testimony is relevant, whether the testimony is useful to a finder of fact, and whether  
20 the testimony is reliable and trustworthy. *Sementilli v. Trinidad Corp.*, 155 F.3d  
21 1130, 1134 (9th Cir. 1998); *Sterner v. U.S. Drug Enforcement Agency*, 467 F. Supp.  
22 2d 1017, 1033 (S.D. Cal. 2006); *Keegan v. American Honda Motor Co., Inc.*, 284  
23 F.R.D. 504, 514-20 (C.D. Cal. 2012). Rule 702's ultimate goal "is to protect juries  
24 from being swayed by dubious scientific testimony." *United States v. Flores*, 901  
25

26 \_\_\_\_\_  
27 <sup>2</sup> The failure of a district court to make this determination and state its reasons for  
28 excluding proffered testimony is an abuse of discretion and reversible error.  
*General Elec. Co. v. Joiner*, 522 U.S. 136, 142-43 (1997).



1 F.3d 1150, 1165 (9th Cir. 2018) (citation omitted). As set forth below, Keep’s  
2 proffered testimony is precisely the type of irrelevant expert testimony the *Daubert*  
3 Court intended for district courts to exclude.

4 **IV. ARGUMENT**

5 **A. Keep Is Not Qualified to Opine on Whether Herbalife Acted**  
6 **Fraudulently by Failing to Disclose Its “Real and Unspoken Goal”**  
7 **of Retention, Distributors’ Likelihood of Success, or Its Control**  
8 **Over Events.**

9 As a threshold matter, “care must be taken to assure that a proffered witness  
10 truly qualifies as an expert” under Rule 702 before allowing him or her to come  
11 “before the jury cloaked with the mantle of an expert.” *Jinro America Inc. v. Secure*  
12 *Investments, Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001). The key determination is  
13 whether the witness has “specialized knowledge” through “experience, training or  
14 education” that is “relevant to such evidence or fact in issue.” Fed. R. Evid. 702;  
15 *United States v. Chang*, 207 F.3d 1169, 1172 (9th Cir. 2000). While “background,  
16 education, and training may provide an expert with general knowledge to testify  
17 about general matters, more specific knowledge is required to support more specific  
18 opinions.” *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 322 (3d Cir.  
19 2003). This is because the “issue with regard to expert testimony is not the  
20 qualifications of a witness in the abstract, *but whether those qualifications provide a*  
21 *foundation for a witness to answer a specific question.*” *Berry v. City of Detroit*, 25  
22 F.3d 1342, 1351 (6th Cir. 1994) (emphasis added); *see also United States v. Chang*,  
23 207 F.3d at 1172 (“To qualify as an expert, a witness must have ‘knowledge, skill,  
24 experience, training or education’ *relevant to such evidence or fact in issue.*”)  
25 (emphasis added); *Barber v. City of Santa Rosa*, 2010 WL 5069868, \*7 (similar);  
26 *Smith v. Pacific Bell Telephone Co., Inc.*, 662 F. Supp. 2d 1199, 1225 (E.D. Cal.  
27 2009) (similar).

28 Keep’s “expert” opinions amount to his own beliefs that Herbalife’s “real and



1 unspoken goal” of retention was unethical, and its conduct in failing to disclose this  
2 “goal,” or information about distributor success and STS events, was fraudulent.  
3 But Keep is a professor of marketing—not an expert in fraud, ethics, or the hidden  
4 intentions of others. He is not qualified to opine on Herbalife’s “real and unspoken  
5 goal” in putting on an event program for its distributors. Similarly, Keep does not  
6 purport to have expertise or knowledge of what constitutes “local control” as  
7 opposed to corporate control of events, or how to make that distinction.

8 Keep is equally unqualified to opine on whether Herbalife failed to disclose  
9 information about the control of STS events and the unquantified “low success rate”  
10 of distributors, or whether it was fraudulent or unethical for Herbalife not to  
11 communicate that information. He has no professional expertise in determining  
12 what Herbalife and third-party distributors “communicated to downline distributors”  
13 “over many years.” He cannot serve as a substitute for the presentation of evidence  
14 to a factfinder of what Herbalife actually did and said. Nor is it for Keep to explain  
15 “the net impression” created by what was presented at events. Or whether  
16 “disinformation” was presented at events and, if so, whether it “obscures and  
17 misrepresents” what Keep considers “the actual typical distributor compensation  
18 and experiences.” These are factual conclusions to be drawn (or not) from the  
19 presentation of evidence to the trier of fact, not matters of expert opinion.

20 And it is certainly not for Keep to determine whether, ultimately, Herbalife  
21 acted fraudulently or wrongfully. Keep is not an ethicist, cleric, judge, or jury, and  
22 has no credentials on which to assess the ethics or legality of Herbalife’s conduct.  
23 The industry ethics and conduct codes Keep quotes essentially say nothing more  
24 than MLMs should avoid fraudulent conduct; they not do apply that generalized  
25 standard to anything akin to Herbalife’s alleged conduct here. They have no bearing  
26 on whether Herbalife acted fraudulently with respect to the claims in this case.

27 As a matter of law, expert testimony should be excluded where, as here, the  
28 expert’s report “amounts to nothing more than personal opinions and assumptions

1 regarding the facts of the case and the motivations that led to its filing,” and “many  
2 of the opinions . . . are nothing more than rank speculation.” *Mesfun v. Hagos*,  
3 No. CV 03-02182 MMM (RNBX), 2005 WL 5956612, at \*11 (C.D. Cal. Feb. 16,  
4 2005). “Opinions of an expert need not be accepted when they are based on nothing  
5 more than personal opinion or belief, instead of an understandable scientific [or  
6 experiential] basis.” *Id.*, citing *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1382,  
7 1393 (W.D. Mo. 1994); *see also*, *Chemipal, Ltd. v. Slim-Fast Nutritional Foods*  
8 *International Inc.*, 350 F. Supp. 2d 582, 588 (D. Del. 2004) (“testimony of an expert  
9 that constitutes mere personal belief as to the weight of the evidence invades the  
10 province of the fact-finder”); *Indiana Insurance Co. v. General Electric Co.*, 326 F.  
11 Supp. 2d 844, 847 (N.D. Ohio 2004) (same). Such expert testimony is inadmissible  
12 because it “would not assist the trier of fact, as jurors are more than capable of  
13 drawing their own conclusions about the evidence presented without the benefit of  
14 [the expert’s] personal interpretation of it.” *Mesfun*, 2005 WL 5956612 at \*11.

15 Because Keep has no expertise that qualifies him to render opinions on  
16 whether Herbalife acted fraudulently, unethically, or otherwise wrongfully, his  
17 opinions and testimony should be excluded entirely.

18 **B. Keep Lacks Any Foundation to Opine on Herbalife’s “Unspoken**  
19 **Goal” of Retention, the Likelihood of Success of Herbalife**  
20 **Distributors or Herbalife’s Level of Control of STS Events.**

21 Expert testimony is reliable only if the expert’s underlying reasoning and  
22 methodology are scientifically valid. *See Daubert, supra*, 509 U.S. at 589–90;  
23 *Messick v. Novarits Pharm. Corp.*, 747 F.3d 1193, 1198 (9th Cir. 2014). “[W]hen  
24 an expert opinion is based on data, a methodology, or studies that are simply  
25 inadequate to support the conclusions reached, Daubert and Rule 702 mandate the  
26 exclusion of that unreliable opinion testimony.” *Lukov v. Schindler Elevator Corp.*,  
27 No. 5:11-cv-00201 EJD, 2012 WL 2428251 \*3 n.4 (N.D. Cal. June 26, 2012)  
28 (citing *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir.

2002)). Thus, when district courts weigh the *Daubert* factors, the district court must continue to function as a gatekeeper who “separates expert opinion evidence based on ‘good grounds’ from subjective speculation that masquerades as scientific knowledge.” *Glastetter v. Novartis Pharms. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001) (citations omitted). Courts must focus on the “reasonableness of using [the expert’s] approach, along with [the expert’s] particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 154, 119 S. Ct. 1167, 1177 (1999).

The methodology, data, and analyses (or lack thereof) that Keep relied on here are “simply inadequate to support the conclusions [he] reached” regarding Herbalife’s goals, its distributors’ likelihood of success, its control over STS events, and whether Herbalife acted fraudulently by not disclosing that information when promoting events. Keep’s expert report and deposition testimony make clear that, other than a few correlation studies not relevant here, no expert research, analysis, or knowledge informed the opinions he intends to offer. Keep reached his opinions regarding Herbalife’s “true, unspoken goal” of retention (and all of his other opinions) by reviewing the same deposition transcripts, exhibits, and documents that will be made equally available to the jury.

### **1. Keep’s Opinions Regarding Likelihood of Success Are Untethered to Any Quantitative Analysis.**

Keep’s latter three opinions—which all relate to Herbalife’s alleged misrepresentation of distributors’ likelihood of success<sup>3</sup>—are effectively an

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<sup>3</sup> Keep’s Opinions IV through VI are: (IV) “Repetitive storytelling of atypical experiences inspire, ignore, and obscure the typical distributor experience, thereby providing, disclaimers notwithstanding, a net impression that the path to success relies upon following the Circle of Success and monthly attendance at STS and corporate events;” (V) “Disinformation shared at STS and corporate events obscures

1 opportunity for Plaintiffs to make him a dubiously-credentialed mouthpiece for their  
2 theory of the case. But Keep admitted he relied on no specialized studies, analysis,  
3 or data to compare Herbalife distributors' rate of success to those of other MLMs or  
4 businesses, and did not even have a standard or metric to assess what would  
5 constitute an "acceptable," as opposed to an unacceptably low, rate of success.  
6 Absent any analysis, study, or methodology whatsoever, there is simply no  
7 foundation for these untethered opinions. *Kumho Tire*, 526 U.S. at 138 (when an  
8 expert's methodology is unsound, the expert's testimony should be excluded). And,  
9 as discussed above, Keep has no expertise that would qualify him to perform this  
10 kind of expert analysis in any event.

11 **2. Keep Does Not Apply Any Expertise to Arrive at His**  
12 **Conclusions Regarding Herbalife's Alleged Control over STS**  
13 **Events.**

14 Keep's complete lack of foundation to opine that Herbalife controlled and  
15 concealed its control over local events is even more egregious. During depositions  
16 in this case, numerous distributors associated with the non-corporate (*i.e.*, local)  
17 STS event programs testified that the events are primarily under the control of top  
18 level distributors, not Herbalife. Specifically, as is reflected in their sworn  
19 declarations, the distributors testified that:

- 20 • The events are put on locally (*See* Dkt. 218-3 ¶ 13; Dkt. 218-4 ¶ 3;  
21 Dkt. 218-5 ¶ 3);  
22 • Expenses are paid by distributors who sponsor the STS events (*See*  
23 Dkt. 218-4 ¶ 3);  
24

25 and misrepresents the actual typical distributor compensation and experiences;" and  
26 (IV) "Herbalife adopted a hear-no-evil, see-no-evil, speak-no-evil approach to  
27 information shared with downline distributors and potential distributors, failing to  
28 share available data relevant to the decision to become or remain an Herbalife  
distributor and to follow the Circle of Success regime."

- 1           • Apart from providing sample product to be given away at STS events,  
2           Herbalife does not provide financial support for the events (Dkt. 218-3  
3           ¶ 13; Dkt. 218-4 ¶ 3; Dkt. 218-5 ¶ 3);
- 4           • Tickets are sold by distributors and the revenues are kept by the  
5           distributors to offset the cost of the events conduct (Dkt. 218-3 ¶ 13;  
6           Dkt. 218-4 ¶ 3; Dkt. 218-5 ¶ 3); and
- 7           • Herbalife does not provide scripts or dictate what is said at events,  
8           other than by offering model agendas and insisting that  
9           communications be consistent with Herbalife’s rules of conduct  
10          (Dkt. 218-3 ¶¶ 13, 15, 16; Dkt. 218-4 ¶¶ 4, 6; Dkt. 218-5 ¶¶ 4, 6).

11 Moreover, Plaintiffs themselves admit in the FAC that the STS system is “owned  
12 and controlled by a web of entities” and registered to distributors—*not Herbalife*—  
13 and that “top distributors receive all of the revenue from STS ticket sales.” (FAC  
14 ¶¶ 76, 80, Dkt. 202.)

15           While Keep does not purport to have any particular expertise or methodology  
16 to assess the extent to which local distributors versus Herbalife “control” these  
17 events, and in spite of Plaintiffs own allegations to the contrary, Keep states that he  
18 simply does not believe this testimony. Without ever defining “control”—financial,  
19 administrative, content-driven, or otherwise—Keep offers the unsupported  
20 conclusion that the events are not “completely independent” or “under local  
21 control.” Keep admits that he reached this conclusion (that Herbalife exercised  
22 control over local events) based on nothing other than deposition testimony of a  
23 handful of individuals. However, nothing about Keep’s career as a marketing  
24 professor qualifies him to make that determination any better than a juror can. *See,*  
25 *Newkirk v. ConAgra Foods Inc.* 438 Fed. App’x. 607, 608- 09 (9th Cir. 2011)  
26 (expert’s testimony excluded where he did not sufficiently justify his foundational  
27 assumption or refute contrary evidence). Nor is this purely factual determination  
28 appropriate for an expert to make anyway.

1 Keep's derivative opinion, that it was fraudulent for Herbalife not to disclose  
2 its purported control over local STS events, is equally lacking in foundation. In the  
3 first place, as discussed above, Keep admits that he has no basis, other than his  
4 assessment of deposition testimony and extrapolations from the conduct of  
5 deponents, to conclude that some distributors misrepresented the extent of  
6 Herbalife's control over local events. Moreover, even assuming that these  
7 misrepresentations were made to some distributors, Keep has no foundation for his  
8 conclusion that the distributors actually cared, *i.e.*, that they were defrauded. To the  
9 contrary, Keep admits that some distributors found Herbalife events valuable  
10 regardless of who "controlled" them (though he performed no survey or analysis of  
11 this issue), and that he took no steps to determine how many distributors would or  
12 would not attend an event they knew *was not* under local control.<sup>4</sup>

13 As such, Keep's opinions reflect the kind of "subjective speculation that  
14 masquerades as scientific knowledge" eschewed by *Daubert* and the Rules of  
15 Evidence. *Glastetter*, 252 F.3d at 989. The "methodology" and data that produced  
16 Keep's "expert" opinions are no different from those available to the jury: a review  
17 of the testimony and evidence in this case to reach a determination as to Herbalife's  
18 conduct, based not on any special skill, analysis, or research, but on the same life  
19 experience and judgment that any lay person possesses. Keep's purported expert  
20 opinions are devoid of any foundation and any value to the jury, and therefore are  
21 inadmissible. *See Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461,  
22 469 (S.D.N.Y. 2005) ("[A]n expert cannot be presented to the jury solely for the  
23

24 \_\_\_\_\_  
25 <sup>4</sup> Plaintiffs may offer Keep's opinion regarding "control" as evidence that  
26 Herbalife and certain unidentified distributors constituted an "enterprise" under  
27 RICO. But Keep's methodology is no less flawed if the testimony is re-engineered  
28 for that purpose. Moreover, because Keep does not distinguish between financial,  
administrative, content-related or other types of control, his opinion as to "control"  
has no connection to the definition of a RICO "enterprise."



1 purpose of constructing a factual narrative based upon record evidence.”);  
2 *Eghnayem v. Bos. Sci. Corp.*, 57 F. Supp. 3d 658, 699 (S.D.W. Va. 2014) (granting  
3 *Daubert* motion where expert’s report reflected “a narrative review of corporate  
4 documents and his opinions are riddled with improper testimony regarding  
5 [defendant’s] state of mind and legal conclusions.”).

6 **C. Keep’s Opinion That Herbalife’s Goal Was Retention Is Irrelevant**  
7 **to This Action.**

8 Keep’s opinions regarding Herbalife’s retention goals are not relevant and do  
9 not “fit” or shed light on specific factual issues in this litigation. Absent a “valid  
10 scientific connection to material facts in dispute,” an expert opinion is irrelevant and  
11 inadmissible. *See* Fed. R. Evid. 402; *U.S. v. W.R. Grace*, 455 F. Supp. 2d 1177,  
12 1179 (D. Mont. 2006) (citing *Daubert*, 509 U.S. at 591). Expert testimony is  
13 relevant only if the expert properly applies his or her methodology or reasoning to  
14 the facts in issue. *See Daubert*, 509 U.S. at 591–93; *U.S. v. Freeman*, 498 F.3d 893,  
15 901 (9th Cir. 2007). “Under the relevancy or ‘fit’ prong, the testimony must be  
16 ‘relevant to the task at hand: *i.e.*, “logically advance[] a material aspect of the  
17 proposing party’s case.’” *Johns v. Bayer Corp.*, WL 1498965 (S.D. Cal. 2013)  
18 (citations omitted). Only expert testimony that is “sufficiently tied to the facts of the  
19 case that it will aid the jury in resolving a factual dispute,” should be admitted.  
20 *Daubert*, 509 U.S. at 591.

21 Relevancy requires opinions that assist the trier of fact in reaching a  
22 conclusion necessary to the case, *see Kennedy v. Collagen Corp.*, 161 F.3d 1226,  
23 1230 (9th Cir. 1998), but “the standard for fit is higher than bare relevance.”  
24 *Redfoot v. B.F. Ascher & Co.*, No. C 05-2045 PJH, 2007 WL 1593239, \*4 (N.D.  
25 Cal. June 1, 2007) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, at 745  
26 n.13 ( 3d Cir. 1994).) As the district court noted in *Astra Aktiebolag v. Andrx*  
27 *Pharmaceuticals, Inc.*:

28 [E]ven if the methodology used by the expert is considered

1 to be reliable, the expert’s testimony will nevertheless fail  
2 to meet the “fit” requirement and should be excluded if the  
3 data relied upon by the expert is materially different from  
4 the data relevant to the facts of the case. [citation omitted]  
5 If the expert has failed to consider the necessary factors or  
6 if the analysis is premised upon a faulty assumption, his  
7 testimony may be excluded for lack of probative value.  
8 [citation omitted.] Likewise, where the proffered  
9 testimony is based on a methodology transposed from one  
10 area to a completely different context, and there is no  
11 independent research supporting the transposition, the “fit”  
12 requirement may not be satisfied.

13 222 F. Supp. 2d 423, 488 (S.D.N.Y. 2002); *see also Domingo ex rel. Domingo v.*  
14 *T.K.*, 289 F.3d 600, 607 (9th Cir. 2002) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S.  
15 136, 146 (1997)) (expert testimony inadmissible where “there is simply too great an  
16 analytical gap between the data and the opinion proffered”).

17 Here, Keep’s testimony that retention was the overarching goal of Herbalife  
18 events cannot “logically advance a material aspect” of Plaintiffs’ case because it  
19 does not “fit” the facts of this case. This case is a civil RICO and unfair competition  
20 action premised on fraud and misrepresentation. Whether Herbalife aimed to  
21 promote retention through its events is entirely irrelevant to whether Herbalife  
22 engaged in *actionable* representations or omissions. *Daubert*, 509 U.S. at 591–93;  
23 *U.S. v. Freeman*, 498 F.3d at 901. In any event, expert testimony is not necessary to  
24 establish that Herbalife hopes that its events system will increase retention among its  
25 distributors. Of course it would. It is manifestly good for any business to retain  
26 distributors and/or customers. Keep himself admits that retention is not an ethically  
27 impermissible goal of any business, including MLMs. Wanting to retain distributors  
28 does not make anything Herbalife did unethical, much less unlawful so as to be  
relevant to Plaintiffs’ RICO and fraud-based claims here. Keep’s global opinions on  
the overall ethics and propriety of an event system aimed at retention are no  
substitute for what the Plaintiffs manifestly do not have here—evidence of specific  
misrepresentations made widely to the class.

There is no valid connection between Keep’s overarching opinion that the



1 primary goal of Herbalife events was retention, and any fact at issue that tends to  
2 prove Plaintiffs' RICO and other fraud-based claims in this action. *Daubert*, 509  
3 U.S. at 591 (expert testimony must be "sufficiently tied to the facts of the case that it  
4 will aid the jury in resolving a factual dispute.") Keep's opinions and expert report  
5 are irrelevant and inadmissible.

6 **V. CONCLUSION**

7 For the foregoing reasons, Herbalife respectfully urges the Court to enter an  
8 order excluding Dr. William W. Keep and precluding him from offering any  
9 testimony or other evidence in this case.

10  
11 DATED: February 15, 2021

Respectfully submitted,

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